

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today
(1) was not written for publication in a law journal and
(2) is not binding precedent of the Board.

Paper No. 19

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DANIEL E. KELLY
and
TED LEMKE

Appeal No. 96-2296
Application 08/091,894¹

ON BRIEF

Before CALVERT, MEISTER and CRAWFORD, Administrative Patent
Judges.

¹ Application for patent filed July 14, 1993.

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CALVERT, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1 to 4, 6 and 7. Claims 8, 9, 11 and 12, the other claims remaining in the application, have been allowed.

The subject matter in issue concerns a stackable tray for bottles or cans. The appealed claims are reproduced on pages 9 to 11 of appellants' brief.

The references applied in the final rejection are:

deLarosiére	4,410,099	Oct. 18,
1983		
Van Onstein et al. (Van Onstein)	4,944,400	July 31,
1990		

Claims 1 to 4, 6 and 7 stand finally rejected under 35 U.S.C. § 103 as unpatentable over Van Onstein in view of deLarosiére.

Van Onstein discloses a tray 2 (Figs. 3 and 4) for a plurality of containers 3, e.g., bottles, which is made of molded plastic (col. 6, lines 50 to 55) and has a bottom wall,

side walls and end walls, there being free-standing pillars 7a,b,c,d spaced about the perimeter of the bottom wall to form U-shaped openings visually exposing a substantial portion of the bottles. The deLarosiére patent discloses a tray 10 for a plurality of multipacks 2 of bottles 4. The tray shown in Fig. 3 is exemplary and holds four six-packs of bottles, each in a receptacle 26. For each six-pack a hollow, tapered pillar 40 extends above the base of the tray. As disclosed in col. 3, lines 18 to 41, and col. 5, lines 29 to 49, each pillar 40 fits within the space between four bottles of a six-pack, and the taper allows the empty trays to be nested on top of one another with each pillar of the lower tray fitting into the hollow interior of the corresponding pillar of the upper tray, as shown in Fig. 4. This allows the trays (cases) to be "nested efficiently when empty" (col. 3, lines 60 and 61).

The examiner takes the position that (answer, page 3):

It would have been obvious to make the pillars of Van Onstein et al tapered as shown by de Larosiére in order to enhance the handling of containers in the tray and to make the trays nestable together so that

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a compact packing may be formed to save storage space when the trays are empty.

Appellants argue on pages 7 and 8 of their brief that, in essence (1) Van Onstein does not disclose a tray with tapered free standing pillars spaced about the periphery of the base; (2) deLarosiére "merely discloses a tray having a single tapered supporting pillar 40 located substantially in the center of the center of the square defined by the four vertices 30A, 30B, 30C and 30D," which "is dimensioned to fit within a space between four bottles of a six pack"; and (3) the combination of references,

therefore, does not contemplate the problem solved by the claimed structure as set out in these claims and therefore the factual predicate necessary to establish a prima facie case of obviousness has not been demonstrated.

After fully considering the record in light of the arguments presented by appellants and the examiner, we conclude that the subject matter recited in claim 1 is unpatentable under 35 U.S.C. § 103.

With reference to appellants' arguments, supra, it is inaccurate to state that the tray of deLarosiére only has a single pillar, since, as discussed previously, the tray shown in Figure 3, for example, has four pillars 40, one for each six-pack. These tapered pillars fit into the interior of the corresponding pillars of the overlying tray when the trays are stacked (Fig. 4).

Appellants' assertion that the combination of references "does not contemplate the problem solved by the claimed structure" is not germane to the propriety of making the combination, since it is settled that:

As long as some motivation or suggestion to combine the references is provided by the prior art taken as a whole, the law does not require that the references be combined for the reasons contemplated by the inventor.

In re Beattie, 974 F.2d 1309, 1312, 24 USPQ2d 1040, 1042 (Fed. Cir. 1992). See also In re Kemps, 97 F.3d 1427, 1430, 40 USPQ2d 1309, 1311 (Fed. Cir. 1996) ("the motivation in the prior art to combine the references does not have to be iden-

tical to that of the applicant to establish obviousness. In re Dillon, 919 F.2d 688, 693, 16 USPQ2d 1897, 1901 (Fed. Cir. 1990) (in banc)."). In the present case, there is ample motivation in the cited references from which one of ordinary skill in the art would have found it obvious to combine the references in the manner proposed by the examiner. Van Onstein notes the importance of being able to stack the empty trays so that "their reduced height saves storage space" (col. 5, lines 22 to 25), and, as noted earlier, deLarosiére discloses that the use of hollow, tapered columns allows the columns to fit one within the other, so that empty trays can be nested one on top of the other, thereby reducing height (col. 3, lines 60 to 64). This teaching of deLarosiére would have readily suggested to one of ordinary skill the use of hollow, tapered columns as the columns of Van Onstein in order to obtain the disclosed advantages thereof.

Claims 2 to 4 and 7, being grouped with claim 1 (brief, page 4), fall therewith. Appellants group claim 6 separately, but since they present no explanation as to why they believe it

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to be separately patentable, it also falls with claim 1.
37 CFR § 1.192(c)(7).

Conclusion

The examiner's decision to reject claims 1 to 4, 6
and 7 is affirmed.

No time period for taking any subsequent action in
con- nection with this appeal may be extended under 37 CFR §
1.136(a).

AFFIRMED

	IAN A. CALVERT)	
	Administrative Patent Judge)	
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)	
)	BOARD OF
PATENT)	
	JAMES M. MEISTER)	APPEALS AND
	Administrative Patent Judge)	
INTERFERENCES)	
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)	
	MURRIEL E. CRAWFORD)	
	Administrative Patent Judge)	

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Foley & Lardner
777 East Wisconsin Avenue
Milwaukee, WI 53202